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The Crown's Title to Lands in England

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3
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IT is trite law that apart from the Crown no person can own land in England allodially. All lands in the hands of subjects are held of some lord, ultimately the Crown, who is lord paramount over every parcel of non-Crown land in the realm.[1] This fundamental principle is the basis of the doctrine of tenures. It pervades English land law. Moreover, it has been said that the application of this principle to territories acquired by the Crown through settlement left little room for a common law doctrine of aboriginal title. Since the Crown is the ultimate proprietor of all lands, the argument goes, all titles, rights, and interests in land are the direct consequence of Crown grants. Without grants, indigenous people could not, at common law, have title to lands occupied by them.[2] This remarkable view arises from a misconception of the effect of the doctrine of tenures. We have already seen that in England perfectly good titles to land can exist apart from Crown grant, as where an adverse possessor remains in occupation of land until all other interests are extinguished by statutory limitation. Nor is the adverse possessor's title due to the statute: it arises at common law as a result of his possession, the effect of the statute being merely to extinguish the right of every other person to chal-

[1] *Grendon* v. *Bishop of Lincoln* (1677) 2 Plow. 493, at 498; *Taylor d. Atkyns* v. *Horde* (1757) 1 Burr. 60, at 109; *Co. Litt.* 1, 65ª, 93ª; Blackstone, *Commentaries*, II.105; 39 *Halsbury's Laws*⁴, par. 304. For a discussion of whether this precludes 'ownership' of land by subjects see Hogg, 'Effect of Tenure', 25 *LQR* 178. Note too that this rule generally does not apply in the Orkney and Shetland Islands: see ch. 5 n. 102 below.

[2] *Milirrpum* v. *Nabalco Pty.* (1971) 17 FLR 141, at 244–5. See also *Re Ninety-Mile Beach* [1963] NZLR 461, at 468, 475; *Re Paulette* (1975) 63 DLR (3d) 1, at 4. Indigenous people might, of course, have statutory titles, as *Re Ninety-Mile Beach* affirmed.

lenge it.[3] Furthermore, even where a freehold in land became unowned, as once happened when a tenant *pur autre vie* died before the *cestui que vie*, the estate generally went to the first person to enter as occupant rather than to the Crown.[4] The conclusion that indigenous people could not have title to lands occupied by them in the absence of Crown grants thus appears rather hasty. But in order to understand the effect of the doctrine of tenures in the colonial situation, a clear appreciation of its effect in England is needed. In this chapter we shall see that with the exception of the foreshore and territorial seabed, the Crown cannot claim lands generally by virtue of the doctrine of tenures. Apart from instances where the applications of this doctrine results in a specific title, as when lands escheat to the Crown, its effect within the realm is to give the Crown a paramount lordship over lands which are held by its subjects. To appreciate why this is so we need to go back to the doctrine of tenures' feudal source in post-Conquest English law.

1. The Origin and Effect of the Doctrine of Tenures

English landholding prior to the Norman Conquest was not feudal in the strict sense of the term. No doubt it was moving in that direction, but in 1066 the process was far from complete.[5] The authority of the later Anglo-Saxon kings was derived not from feudal lordship over their subjects as landholding tenants

[3] See *Tichborne* v. *Weir* (1892) 67 LT 735; *Atkinson & Horsell's Contract* [1912] 2 Ch. 1, at 9, 17; *Fairweather* v. *St Marylebone Property* [1963] AC 510, esp. 535.

[4] *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, at 667 (see n. 29 below). But recall the exception where the Crown was reversioner: see ch. 2 n. 20 above.

[5] The extent to which English feudalism predated the Conquest has long been a controversial topic. We cannot enter this debate here, or even review the authorities, but it is probably safe to state as a general proposition that feudalism, as a system of dependent land tenure, was by no means universal in England prior to 1066. Support for this may be found in the works cited in nn. 7–12 below.

but from the reverence and respect paid to them as 'anointed monarchs'.[6] This authority, which we would describe as jurisdictional, included the right to collect certain dues, both fiscal and justiciary, from landholding subjects. The practice developed of granting rights of this sort out, sometimes to important men, but more often to the Church. However, as the Anglo-Saxons did not make a clear distinction between jurisdiction and property, these grants commonly took the form of gifts of land, known as *bócland* (book-land). Grants of *bócland* may have included lands that were owned by the king, but they were principally grants of a 'superiority' over lands owned by others.[7] Something approaching dependent feudal tenure was thus developing from the top of English society down.[8] At the same time a similar process was taking place from the bottom up. Small landowners, whether for reasons of security, economics, or simple piety, were commending themselves and their lands to great men and the Church.[9] These influences were creating a system of landholding in Anglo-Saxon England which the Normans regarded as feudal.[10] But though most lands in subjects' hands may by then have been held *under* a lord, they were not necessarily held *of* a lord in the feudal sense.[11] There were still men who were free to take their lands to whatever lord they chose.[12]

This diversified Anglo-Saxon system of landholding disappeared in the aftermath of the Norman Conquest.[13] The organizing Normans imposed their feudal preconceptions, in particular the rule that there could be *nulle terre sans seigneur*, on

[6] Van Caenegem, *Birth of Common Law*, 8. See also Maine, *Ancient Law* (1930 edn.), 114–16; n. 19 below.

[7] See Maitland, *Domesday Book*, 230–42.

[8] Ibid. 169–70, 318–24. Subgrants were also made, usually for a limited term in the form of *laénland* (loan-land): ibid. 301–15.

[9] Ibid. 320, 325–6.

[10] *HEL* I[7]. 19–25.

[11] Maitland, op. cit. 154.

[12] Ibid. 48–50; Vinogradoff, *Growth of the Manor*[2], 294. See also Stenton, *First Century*, 214–15.

[13] See *Co. Litt.* 191[a], sect. VI. 1 of Butler's n.; Williams, *Real Property*[13], 2–5; Noyes, *Institution of Property*, 229–32; van Caenegem, *Birth of Common Law*, 6–7; *Cheshire and Burn's Real Property*[13], 12–13.

the English people.[14] Landowners who had previously been under the jurisdiction of a lord were regarded as his tenants, as holding their lands of him in the truly feudal sense. This theory was applied universally, from the lowest levels of society up to the king at the apex of the feudal pyramid.[15] The king was not just the sovereign of his subjects and the territory within his realm, but lord paramount as well as over all landholders and their lands. As the common law developed, it thus became a maxim that all lands in the hands of subjects are held, either mediately or immediately, of the Crown.

However, this feudal theory required factual justification. Descent aside, at common law possession generally had to be taken for a right of property to be acquired.[16] For this reason the rights attached to the king's paramount lordship needed a possessory base. According to feudal doctrine, then, the king must at one time have been in possession of all lands in the realm, some of which he granted out to subjects in return for services.[17] Those services, together with the incidents of tenure, including escheat,[18] constituted the king's lordship, which though incorporeal was possessed and owned by the king as a thing, separate from the land to which it related.[19]

[14] See Vinogradoff, *Growth of the Manor*², 293–6. Blackstone thought Norman feudalism had been freely accepted by the English: *Commentaries*, II. 48–51. See also Reeves, *History of English Law*², I. 207.

[15] Simpson, *History of Land Law*², 2–3.

[16] See Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 489–95; Smith, 'Unique Nature of Concepts', 46 *CBR* 191, at 200–2.

[17] See *Co. Litt.* 65ᵃ. At common law, if the king was not in possession, he could not grant land, but at best a right to acquire possession of it, assuming he had such a right, and then only expressly: *Winchester's Case* (1583) 3 Co. R. 1ᵃ, at 4ᵇ–5ᵃ.

[18] See *Veale* v. *Brown* (1868) 1 NZCA 152, at 156–7; *A.-G. of Ontario* v. *Mercer* (1883) 8 App. Cas. 767, at 772, 777–9; Hardman, 'Law of Escheat', 4 *LQR* 318, esp. 322–5.

[19] See P. & M. II. 3–4, 38–9, 125–8, 152; Simpson, *History of Land Law*², 47–8. Though the king was said to possess his kingdom (see Honoré, 'Allegiance and the Usurper' [1967] *Camb. LJ* 214, at 214–15), this was as a unit which, like a manor, consisted of demesne lands and services: on manors see *Delacherois* v. *Delacherois* (1862–4) 11 HLC 62, esp. 102; Williams, *Seisin*, 13, 30; P. & M. II. 127–8. The king's paramount lordship thus constituted the feudal aspect of his sovereignty, which in that respect did not differ in kind from the authority which mesne lords exercised over their tenants. There was thus little qualitative distinction between the king's lordship over the whole realm and a mesne lord's seignory over his honour or manor. But even the Norman kings were more than feudal sovereigns: William I demanded homage and fealty from all freemen, not just his tenants in chief; he reinstated the Danegeld, a form of direct taxation on land; and he continued to exercise jurisdiction through non-feudal local courts and sheriffs. Pollock was thus no doubt correct when he wrote that '[i]t must not be supposed . . . that medieval lawyers were incapable of distinguishing between territorial sovereignty and feudal overlordship' (Maine, *Ancient Law* (1930 edn.), n. H, at 130). This distinction, however, was far from clear. Referring to the medieval period Maitland wrote that '[a]ll land in England must be held of the king of England, otherwise he would not be king of all England' (P. & M. II. 3). It seems that the Normans wedded their conception of 'feudal leadership with Anglo-Saxon kingship' (van Caenegem, *Birth of Common Law*, 8).

But this explanation of feudal tenure presented a problem, for in view of the facts and law of the Anglo-Saxon period the king could not have been the original possessor of all lands in the realm. It has therefore been suggested by some that William I acquired all the lands in England by conquest.[20] This view cannot be supported. For even if we assume that William acquired the kingdom by conquest rather than as legitimate successor to Edward the Confessor—a matter which has been debated[21]—this does not mean he acquired all the lands as well. What he did acquire were the lands of King Edward and the lands and 'superiorities' of the English nobles who had fought with Harold or resisted the Normans after the Battle of Hastings.[22] The former belonged to William as successor to Edward, whereas the latter were confiscated by him and seized into his hands, either by right of conquest or as forfeitures for rebellion against his 'legitimate' authority. That these confiscations did not affect inferior landowners, except in so far as Norman lords and Norman conceptions of dependent tenure were imposed upon them,[23] is evidenced, perhaps, by the

[20] e.g. Cam, *Law-Finders*, 8.

[21] See Yale, 'Hobbes and Hale' [1972B] *Camb. LJ* 121, at 133.

[22] See *Case of Tanistry* (1608) Davis 28, at 41 (summarized in Newark, 'Case of Tanistry', 9 *NILQ* 215); 'Case of Carlisle' (1647), petitioners' arg., in 'Brief Collection', MS Rawl. C. 94, 15 (see ch. 5 nn. 14–16 and text below); Blackstone, *Commentaries*, II. 48; P. & M. I. 92.

[23] See Simpson, *History of Land Law*², 4–5. Even unconfiscated superior landholdings were otherwise unaffected by the Conquest: see account of *Warren's Case*, from the time of William I, in *Case of Tanistry* (1608) Davis 28, at 41; *Witrong* v. *Blany* (1674) 3 Keb. 401, at 402.

survival of the old Anglo-Saxon system of strip-holding,[24] and by the Domesday survey, the purpose of which was to determine who held what lands of whom, an inquiry that probably would have been unnecessary had all landholding been the result of post-1066 grants from above.[25] The better view, therefore, is that it is mainly a fiction of law, adopted for the purpose of justifying the feudal concept of paramount lordship, that all lands in the realm were once in the hands of the king, and that subjects' titles were originally derived from royal grants.[26]

Since the fiction encompasses royal grants as well as original Crown ownership, it generally cannot be used in England to challenge a subject's title to land.[27] The Crown cannot, on the strength of its fictitious original title, require a person who is in possession of land to prove his right by producing a royal grant, for in most cases no grant exists.[28] The grant is deemed in law to have been made, if not to a predecessor of the present possessor, then to someone else. It makes no difference if the

[24] On this system see Maitland, *Domesday Book*, 337–8; Vinogradoff, *Growth of the Manor*[2], 175–9; *HEL* II[4]. 56–63; cf. Orwin and Orwin, *Open Fields*[2], esp. 36–42.

[25] See *Case of Tanistry* (1608) Davis 28, at 41; Hale, *Prerogatives*, 92 SS, 8.

[26] '[T]he right of the people of England to their property does not depend upon, nor was in fact derived from, any royal grant. The reception of the feudal policy, in this nation, exactly answers the definition of a fiction; which is—some supposition in law, for a good reason, against the real truth of a fact in a matter possible to have been actually performed, according to that supposition' (Anon., *Considerations on Forfeitures*[4], 64–5; italics and footnotes omitted). See also Blackstone, *Commentaries*, II. 51; *Bacon's Abr.*, 'Prerogative', B. 1; Chitty, *Prerogatives*, 211; *A.-G.* v. *Brown* (1847) 1 Legge 312, at 318; *Doe d. Wilson* v. *Terry* (1849) 1 Legge 505, at 508–9; *A.-G. of Ontario* v. *Mercer* (1883) 8 App. Cas. 767, at 771–2. In *The King* v. *Lord Yarborough* (1828) 2 Bli. (NS) 147, at 159, Best LCJ, relying on Locke, stated that 'all titles to land [meaning, no doubt, original titles] have been acquired by individuals . . . by occupation and improvement.'

[27] The foreshore and the beds of tidal rivers and coastal waters are in a category of their own: see nn. 113–24 and text below. On restrictions on the use of fictions generally see ch. 7 n. 92 below.

[28] But where the Crown alleged that it had possession, at one time a person in occupation of land would have had to prove his own possession, as we shall see when we examine informations of intrusion. But even then the courts would presume a lost grant where necessary to protect long and uninterrupted occupation, unless a grant could not have been lawfully made: see *Bedle* v. *Beard* (1607) 12 Co. R. 4[b]; *Roe d. Johnson* v. *Ireland* (1809) 11 East 280; *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488; *AG* v. *Lord Hotham* (1823) Turn. & R. 209; *Doe d. Devine* v. *Wilson* (1855) 10 Moo. PC 502, at 527; 8 *Halsbury's Laws*[4], par. 1056–8. Furthermore, a lost grant, at least of an easement or *profit à prendre*, may be presumed even where it appears that no grant was made: see *White* v. *McLean* (1890) 24 SALR 97, at 101; *Tehidy Minerals* v. *Norman* [1971] 2 QB 528, at 552. Note, however, the distinction between a presumed grant of land to which the Crown once had an actual title, and a grant deemed in law to have been made of lands respecting which original Crown ownership is a mere fiction.

possessor is in fact a disseisor. The Crown must prove its present title just like anyone else.[29]

We have seen that a disseisor has a tortious estate, in most cases a fee simple, by virtue of his possession. The estate is primarily the measure of his interest in the land. But since fee simple estates, when held by subjects in England, are always held in tenure, he holds his estate as tenant,[30] logically of the lord of the disseisee. However, Littleton wrote that a disseisee

[29] Note that the Crown could at one time by *quo waranto* force a possessor of land to reveal his title in a general way, and show, for example, whether he held as heir or as possessor, but this action *in personam*, unless combined with an action *in rem*, such as a claim by escheat or as ancient demesne, could not be used to obtain the land; for even if the possessor had no right (apart from the title that goes with possession), it did not follow that the Crown had right: *Bracton*, IV. 168–9. See also *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, at 667, where Lord Blackburn dismissed the suggestion that the Crown is entitled by prerogative to all land to which no one else can show a title; for if that were the case, acquisition of a *pur autre vie* estate by occupancy would not have been possible: see also per Lord Cairns at 652–3, Lord Hatherley at 658. Though that case arose in Ireland, a territory the Crown had acquired by conquest (*Campbell* v. *Hall* (1774) 1 Cowp. 204, at 210; Hale, *Prerogatives*, 92 SS, 32–3), the applicable law was assumed to be the same as in England: see per Lord Gordon at 671. See also *Johnston* v. *O'Neill* [1911] AC 552. The *Bristow* decision is consistent in this respect with the *Case of Tanistry* (1608) Davis 28, at 40, where it was resolved that the conquest of Ireland did not give the Crown possession of lands in the absence of a record that the conqueror had seized the lands at the time of the conquest and appropriated them to himself as part of his demesne: see discussion in Lester, 'Territorial Rights', 309–13; ch. 6, text acc. nn. 50–1 below. See too *Nireaha Tamaki* v. *Baker* [1901] AC 561, at 576; *Wallis* v. *Solicitor-General for New Zealand* [1903] AC 173, at 188; *Tamihana Korokai* v. *Solicitor-General* (1912) 32 NZLR 321, at 345, 352. In *Doe d. Wilson* v. *Terry* (1849) 1 Legge 505, at 508–9, Stephen CJ said: 'In England . . . the title of the Sovereign to land is a fiction; or, where the Crown really owns land, the property is enjoyed as that of a subject is, and by a title which admits of proof by documentary or other evidence.'

[30] See Simpson, *History of Land Law*[2], 102. But Simpson overstated the matter when he wrote that 'to say of a person that he has an estate is to describe his legal position *as tenant*': see ch. 5 nn. 78–85 and text below.

could compel the lord to avow upon him, and thus acknowledge the tenancy between them, 'for if he [the lord] avow upon the disseisor then upon the matter shewn the avowrie shall abate, for the disseisee is tenant to him in right and in law.'[31] Commenting upon this, Coke said that the lord would have his escheat if the disseisee died without heirs, unless he had accepted corporal service, such as homage or fealty, from the disseisor, or the disseisor had enfeoffed another or died seised, for then the lord would have a tenant in by title.[32] Likewise, where the disseisee left an heir of his body within age, the lord at common law would have wardship of the heir.[33] However, the lord would also be entitled to escheat and wardship in appropriate circumstances where the disseisor died seised,[34] whether he had accepted services from him or not.[35] It seems, therefore, that both disseisee and disseisor would have been tenants of the lord, the disseisee in right and law, the disseisor in fact.[36]

Thus, a disseisor who ousts a freehold tenant of the Crown takes the disseisee's place as tenant in fact. Once the disseisee's

[31] Littleton, *Tenures*, s. 454. See also *Co. Litt.* 240ª, Butler's n. 1.

[32] *Co. Litt.* 268. Quaere whether Coke's exception respecting feoffees is correct, since it was the disseisee's right of entry, not his right of action, that escheated (see Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 487, citing *Winchester's Case* (1583) 3 Co. R. 1ª, at 2ᵇ; *Viner's Abr.*, 'Escheat', C. 17–18), and we have seen that by Littleton's day a feoffment not amounting to a discontinuance did not take away a right of entry. However, authority in this area of the law is far from consistent, as perusal of *Viner's Abr.*, 'Escheat', esp. A. 14, B. 1–2, 7, 13, C. 5, 9, E. 2–7, reveals (perhaps because the law respecting rights of entry changed between the time of Bracton and Littleton). Note too that there was no escheat in the early common law when a disseisee died without heirs: Maitland, loc. cit.; *HEL* iii⁵. 92, viii². 34–5. The probable explanation is that in those days a disseisee lost his right of entry when the disseisor acquired the fee.

[33] *Co. Litt.* 76ᵇ.

[34] Ibid.; Maitland, 'Mystery of Seisin', 2 *LQR* 481, at 488. However, Maitland said that the lord's rights in these cases were defeasible by the disseisee: see also YB 9 Hen. VII, 24, pl. 11; Littleton, *Tenures*, s. 390; *Viner's Abr.*, 'Escheat', B. 9.

[35] In *Bevil's Case* (1576) 4 Co. R. 8ª, at 11ª, it was said that a lord would have escheat though not seised of his services within the time of limitation, for 'the seignory remains, although there wanted seisin'. Thus, the existence of a tenancy did not depend on receipt of services. In fact, a tenancy could exist without any service being due: P. & M. i. 234.

[36] Cf. Sweet, 'Seisin under Deeds of Grant', 51 *Sol. J.* 512: 'Disseisin does not destroy the relation of tenure between the disseisee and his lord, and, therefore, does not establish the relation of tenure between the disseisor and the lord'. Sweet's concluding statement is wrong, for it means that the disseisor holds the land of no one, which cannot be, or of the Crown, which conflicts with auth. in n. 34 above. Others have had trouble with this issue too: see Meredith, 'A Paradox of Sugden's', 34 *LQR* 253, at 259; Wade, 'Landlord, Tenant and Squatter', 78 *LQR* 541, at 544–5.

right to recover the land is barred by statute, his tenancy in law is extinguished, causing the disseisor's tenancy in fact to ripen into a lawful tenancy.[37] This happens notwithstanding the absence of a grant creating the tenancy. The relationship of lord and tenant arises at law in this situation simply because the disseisor is in possession of land over which the Crown is lord. But in this case it may none the less be said that the Crown's lordship over the *land* was created by grant, whether actual or deemed, and that the disseisor has merely usurped the place of the rightful tenant. There is, however, a situation in which a tenancy is created between Crown and subject where no grant has been made, nor need be deemed made, and that is where a subject occupies Crown land for the time necessary to defeat the Crown's title.

At common law the Crown's title to land could not be destroyed by adverse possession, for *nullum tempus occurrit regi*.[38] In fact, adverse possession against the Crown was itself an impossibility, for the Crown could be neither disseised nor dispossessed.[39] An unlawful entrant on Crown land was a mere trespasser, an 'intruder' in the technical language of the law.[40]

[37] The statute 21 Jac. I, c. 16, which barred the disseisee's entry without extinguishing his title, would not have prevented the disseisee from defeating the disseisor's tenancy and reviving his own by recovering the land in a real action. Modern statutes of limitation, starting with the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27, preclude this possiblility by extinguishing the right and title as well as barring the entry.

[38] See Chitty, *Prerogatives*, 379–80; Lightwood, *Time Limit*, 140; cf. *Bracton*, ii. 58. For exceptions to the maxim see *Co. Litt.* 119ª, Hargrave's n. 1.

[39] *Lee* v. *Norris* (1594) Cro. Eliz. 331; *The King* v. *Bishop of Winton* (1604–6) Cro. Jac. 53, 123. But see n. 110 below.

[40] *Elvis* v. *Archbishop of York* (1619) Hob. 315, at 322; *Emmerson* v. *Maddison* [1906] AC 569, at 575; *Commonwealth of Australia* v. *Anderson* (1960) 105 CLR 303, at 314, 322. Note that at common law encroachment on Crown lands, known as purpresture, was a form of common nuisance punishable in Glanvill's day by forfeiture of the lands held of the Crown by the encroacher: see Hall, *Glanvill*, 113–14; Coke, *2nd Institutes*, 38, 272; Blackstone, *Commentaries*, iv. 167.

He did not acquire an estate or interest by his entry, and could not recover the land in an action of ejectment against a subsequent intruder.[41] However, the rule that no subject could acquire a title adverse to that of the Crown contained the potential for great oppression; for once a Crown title, no matter how old, appeared, then no length of occupation could prevail against it in the absence of proof of a Crown grant.[42] For this reason an Act was passed in 1623 to bar the Crown from claiming real property, other than liberties and franchises, by reason of any right or title which had accrued sixty years or more before the then session of Parliament, unless the Crown or its predecessor in title had been in receipt of rents or profits (i.e. in possession) during that period.[43] As this statute became progressively less effectual with the passage of time, the *Crown Suits Act*, 1769 (commonly called the *Nullum Tempus Act*) was enacted, limiting the time during which the Crown could make such a claim to sixty years from the time the right or title accrued.[44]

However, since an intruder on Crown lands, unlike a disseisor, does not have an estate or interest, the framers of these Acts thought it necessary to do more than extinguish the Crown's title. It was accordingly enacted that once the time for barring the Crown's claim had passed, the person who had enjoyed the land or taken the rents or profits, either himself or as successor to others, for the space of sixty years, should quietly hold the land, for the estate or interest which he had or

[41] *Johnson* v. *Barret* (1646) Aleyn 10; *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488; *Harper* v. *Charlesworth* (1825) 4 B. & C. 574, at 589, 592. See discussion in Hargreaves, 56 *LQR* 383–5.

[42] See Coke, *3rd Institutes*, 188. A device the courts invented to avoid injustice of this kind in some instances was the presumption of a lost grant: see n. 28 above.

[43] 21 Jac. I, c. 2, s. 1 (2). See *Co. Litt.* 119[a], Hargrave's n. 1. The Crown was in receipt of rents or profits if they were 'duly in charge' to the Crown or stood '*insuper* of record'. Originally that meant they had to be entered on the pipe roll (Coke, *3rd Institutes*, 189), but under later statutes (cited in the next note) it sufficed if, though unpaid, they were charged in the Crown books: Lightwood, *Time Limit*, 144, 152; *A.-G. for New South Wales* v. *Love* [1898] AC 679, at 686.

[44] 9 Geo. III, c. 16, s. 1. This Act was supplemented by the *Crown Suits Act*, 1861, 24 & 25 Vict., c. 62. See discussion in Lightwood, *Time Limit*, 143–52; Carson and Bompas, *Real Property Statutes*[2], 123.

claimed, against the Crown and any person claiming under the Crown.[45] This provision, wrote Coke, was affirmative. It established the estate of the subject in two situations: first, where the Crown had a vested estate (that is, where the Crown was seised, and the subject, an intruder, merely *claimed* an estate); and secondly, where the Crown had a bare right (that is, where the subject *had* an estate, defeasible by the Crown which had title, as where the subject disseised the Crown's tenant, who was later attainted of felony and died).[46] Thus, unlike statutes of limitation relating solely to subjects, whose operation is merely negative, the 1623 and 1769 Acts conferred a statutory title on an adverse occupier of Crown lands.[47]

The *Nullum Tempus Act* was repealed and replaced by the *Limitation Act*, 1939,[48] a statute of limitations of general application. Section 30 (1) provided that, save as was otherwise expressly provided, the Act should apply 'to proceedings by or against the Crown in like manner as it applies to proceedings between subjects'. However, whereas the limitation period placed on subjects (other than spiritual or eleemosynary corporations sole) for bringing actions to recover land was 12 years from the date on which the right of action accrued, the Crown was given 30 years to bring such actions with respect to ordinary lands (apart from gold and silver mines, which are

[45] 21 Jac. I, c. 2, s. 1 (3), (4); 9 Geo. III, c. 16, s. 1.

[46] Coke, *3rd Institutes*, 190.

[47] See *Tuthill* v. *Rogers* (1844) 1 J. & La T. 36, esp. 62, 72, where the *Crown Claims Limitation (Ireland) Act*, 48 Geo. III, c. 47, s. 1, which is substantially the same as the English Acts in this respect, was interpreted and applied. However, it is probably incorrect to say, as the judges in that case did, that the Act 'transferred' the title or estate of the Crown to the subject, for the Act merely validated the estate which the subject already had or claimed to have. Cf. *Goodtitle d. Parker* v. *Baldwin* (1809) 11 East 488, at 495, where Lord Ellenborough, referring to the *Crown Suits Act*, 1769, said: 'The Statute ... does not give a title; ... it only takes away the right of suit of the Crown or those claiming from the Crown against such as have held an adverse possession against it for 60 years'. This dictum goes to the other extreme, and appears to contradict the express words of the statute: see s. 5, which refers to 'the estates, rights and interests, established and made sure by the present Act'.

[48] 2 & 3 Geo. VI, c. 21. This Act was itself replaced by the *Limitation Act*, 1980, c. 58, which contains substantially the same provisions as those we are about to consider.

vested in the Crown by prerogative),[49] and 60 years with respect to the foreshore.[50] At the expiration of the relevant period the Crown's title would be extinguished.[51]

Unlike the earlier statutes limiting Crown claims to land, the 1939 Act was purely negative in operation. It extinguished the Crown's title without conferring a title on the person in occupation. In that respect, the Act treated an intruder on Crown lands just like any other adverse possessor. However, unless the Act did away with the old rule that the Crown could not be disseised or dispossessed in the sense of being deprived of its estate by unlawful ouster, the adverse 'possessor' of Crown lands would still be an intruder: he would not have an estate or interest.[52] His 'possession' would, therefore, have to give him an estate the moment the Crown's title was extinguished. Like the general occupant of lands subject to a vacant *pur autre vie* estate, he would have a title simply because he was in possession of lands to which no one else had a better claim.[53] A common

[49] 2 & 3 Geo. VI, c. 21, s. 30 (4).

[50] S. 4. See also s. 6 (2), specifying the limitation period where the Crown has a remainder or reversion. Note too that s. 9 (1), (3), relating to tenancies at will and wrongful receipt of rent, did not apply to the Crown: s. 9 (4).

[51] S. 16.

[52] S. 10 (1) provided that no right of action to recover land should be deemed to accrue unless there was adverse possession. Thus, if the Act was to apply to the Crown at all, adverse possession of Crown lands must have been possible. However, this would not mean that the adverse possessor would have divested the Crown of its estate: see Coke, *3rd Institutes*, 190; *Tuthill* v. *Rogers* (1844) 1 J. & La T. 36; *Doe d. Fitzgerald* v. *Finn* (1845) 1 UCQB 70, at 90–1. *Chitty's Statutes*[5], 'Crown', 8 n. (*k*), cited in *McGibbon* v. *McGibbon* (1913) 9 DLR 308, at 314, stated: 'Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession in fact against the crown.' See also *Doe d. Watt* v. *Morris* (1835) 2 Bing. (NC) 189, at 197; *Hamilton* v. *The King* (1917) 54 SCR 331, at 371. Although these authorities relate to the earlier Acts, there is no reason to conclude that the 1939 Act changed the law in this respect.

[53] In the case of successive adverse possessors, this means that title would be acquired by the person in possession when the limitation period expired. Earlier adverse possessors who could not have recovered the lands in ejectment while the Crown's title continued would have no better claim after that title was extinguished. Contrast this with the case of lands not owned by the Crown, title to which goes to the first of a series of wrongdoers: see *Asher* v. *Whitlock* (1865) LR 1 QB 1, esp. 4–5; *Dalton* v. *Fitzgerald* [1897] 2 Ch. 86, at 90–1.

law title could thus be acquired to lands which had never been granted by the Crown.[54]

But even an intruder who acquired a title in this manner would have to hold the lands in tenure. The earlier Acts dealt with this matter expressly by providing that the lands to which they applied should be held of the Crown or other person by the same tenures 'as the same should or ought of right to have been holden, if the estates, rights and interests established and made sure by this present act had been before the making of this act firm, good and effectual in law'.[55] No such provision appeared in the *Limitation Act*, 1939. This omission is not explained by the legislative reforms of real property law in the 1920s, for although many of the old incidents of tenure, most significantly escheat for want of heirs, were then abolished,[56] the fundamental principle that all lands are held in tenure survived.[57] More likely, this saving provision was omitted

[54] See *A.-G. for New South Wales* v. *Love* [1898] AC 679, where the *Nullum Tempus Act* was so applied, and *A.-G. for British Honduras* v. *Bristowe* (1880) 6 App. Cas. 143. Note too that the foreshore and beds of tidal rivers and coastal waters, which are prima-facie ungranted Crown lands (see n. 113 and text below), may be acquired by accretion by the holder of the adjoining land: see *The King* v. *Lord Yarborough* (1828) 2 Bli. (NS) 147. Though Best LCJ there regarded occupation and improvement, as in the case of other lands (see n. 26 above), to be the source of title, it was said in *Sec. of State for India* v. *Foucar* (1933) LR 61 IA 18, at 26, that land so acquired is deemed to have been included in the original Crown grant of the adjoining land; cf. *Scratton* v. *Brown* (1825) 4 B. & C. 485, esp. 498–9, where a grant of land bordering the sea was regarded to be of a moveable freehold, the boundary of which shifts as the sea recedes or encroaches imperceptibly. See also *Baxendale* v. *Instow Parish Council* [1982] Ch. 14, esp. 23; *Southern Centre of Theosophy* v. *South Australia* [1982] AC 706, esp. 716.

[55] 21 Jac. I, c. 2, s. 4 (1); 9 Geo. III, c. 16, s. 5.

[56] See *Law of Property Act*, 1922, 12 & 13 Geo. V, c. 16, s. 138 (1). Escheats for want of heirs were abolished by the *Administration of Estates Act*, 1925, 15 & 16 Geo. V, c. 23, s. 45 (1) (*d*), in lieu of which s. 46 (1) (vi) gave the Crown the indistributed residuary estate of an intestate as *bona vacantia*. Note that the *Crown Estate Act*, 1961, 9 & 10 Eliz. II, c. 55, s. 8 (3) provides none the less for escheat of land to the Crown, which, according to 8 *Halsbury's Laws*[4], par. 1070 n. 1, will happen 'where the legal estate in land vests in the Crown on the dissolution of a company or in cases where the Treasury Solicitor has disclaimed a bankrupt's property' (see also Williams, 'Fundamental Principles', 75 *Sol. J.* 843, at 847–8).

[57] Williams, op. cit. 843.

because it was unnecessary. As subjects cannot own lands allodially in England, the doctrine of tenures would apply of its own force to give the Crown its paramount lordship over lands which had been acquired from it by the adverse possession of a subject.[58] No grant would be necessary for this tenurial relationship to exist. It would simply arise at law. Medieval lawyers, had they been confronted with this situation, probably would have preferred to fabricate a grant from the Crown, but in modern times resort to the old fiction hardly seems necessary. As the adverse possessor could acquire no more than an estate in fee simple, the law would reserve the lordship to the Crown when its title to the land itself was extinguished.[59]

To summarize: where a subject is in possession of land in England, the effect of the doctrine of tenures is to give the Crown the feudal rights which are its due as lord paramount. As a general rule, the fiction of original ownership cannot be used by the Crown to recover the land because the law deems a grant to have been made. The doctrine of tenures can none the less result in an actual title where lands escheat to the Crown.[60] But as against a subject who is in possession, the Crown must prove its present title just like anyone else. Where the Crown claims to have possession, however, different considerations apply. This brings us to the rule that unless possession is cast

[58] See *Viner's Abr.*, 'Tenure', B. a. 15: 'If the king grants land to J.S. in fee, to hold as freely as the king is in his crown, yet he shall hold of the king'. In other words, not even the Crown can give allodial ownership to a subject. Nor is it necessary for services (other than fealty, from which tenancies at will and in frankalmoin were none the less exempt: see Littleton, *Tenures*, ss. 130–2, 135) to be due, for 'though the king releases to his tenant all services, yet he holds of him' (*Comyns' Dig.*, 'Tenure', A). Paramount lordship, it seems, is an inalienable aspect of the Crown's sovereignty: see n. 19 above.

[59] Where the estate the Crown owned was not a fee simple, the Crown's lordship over the reversion or remainder (or other mesne seignory, if any), having been there all along, would simply continue.

[60] See gen. Blackstone, *Commentaries*, II. 244–57. Note that forfeiture to the Crown for high treason, which applied to all lands until abolished along with escheat for felony by the *Forfeiture Act*, 33 & 34 Vict., c. 23, s. 1, did not result from feudal tenure: see Chitty, *Prerogatives*, 215; Hardman, 'Law of Escheat', 4 *LQR* 318, at 324. Due to statute, escheat and forfeiture are now of minor importance: see n. 56 above; 39 *Halsbury's Laws*[4], par. 596–7.

upon it by law, for the Crown to be in possession of land its title in most cases must appear as a matter of record.[61]

2. Possession and the Record of the Crown's Title

In Chapter 2 we concluded that a subject's title to land is presumed from possession. We used the term 'possession' in a broad sense to express a conclusion of law based on physical presence on or control over land. Crown possession, however, is not like that of a subject. We have seen that at common law the possession of the Crown generally could not be displaced by a subject. But the reverse was also true: statutes of limitation apart, the Crown could not disseise or dispossess a subject.[62] This rule was not part of the early common law.[63] It may have developed as a consequence of chapter 29 of *Magna Carta*, which provides that '[n]o Freeman shall . . . be disseised of his Freehold . . . but by lawful Judgement of his Peers, or by the

[61] The relevance of this rule to indigenous land rights seems to have been first noticed by Geoffrey Lester: see 'Territorial Rights', 260–341, 1004–71.

[62] *Friend* v. *Duke of Richmond* (1667) *Hard.* 460, at 462; *St German's Doctor and Student*, 91 SS, 65; Rastell, *Termes of the Lawes*, 'Disseisor and Disseisee'; *Viner's Abr.*, 'Disseisin', D. 19, 20. But in *A.-G.* v. *Tomline* (1880) 15 Ch. D. 150, esp. 158, the *Real Property Limitation Act*, 3 & 4 Will. IV, c. 27 was applied to give the Crown title to lands which it had possessed adversely. Similarly, the *Limitation Acts* of 1939 (2 & 3 Geo. VI, c. 21) and 1980 (c. 58), which apply to proceedings 'by *or against* the Crown' in like manner as between subjects (ss. 30 (1) and 37 (1) resp., emphasis added), imply that the Crown can be an adverse possessor. However, since it is possible to be adversely in 'possession' without being a disseisor or dispossessor (as we saw when considering adverse possession against the Crown) it is unlikely that these statutes changed the rule that the Crown could not commit such wrongs. But since this would mean that the Crown could not acquire a tortious estate, how could it make a lease while in adverse possession, as it did in *Sec. of State for India* v. *Krishnamoni* (1902) LR 29 IA 104? The answer may be that the issue was simply not raised.

[63] *Magna Carta* (1215) 17 John, cc. 52, 56–7, provided expressly for restoration of lands which the Crown had acquired by disseisin: see McKechnie, *Magna Carta*[2], 448–50, 456–8. See also P. & M. I. 517; Milsom, *Legal Framework*, 20, 24–5.

law of the Land.'[64] Because the king could not be impleaded in his own courts without his consent,[65] this provision would have been a virtual dead letter had the law continued to accept the possiblity of disseisin by the Crown. The rule that the Crown cannot be a disseisor therefore may have evolved by necessary implication from the Charter.[66]

Though the Crown's title to lands is probably as dependent on possession as a subject's, it appears that the Crown cannot acquire or lose possession by the same means. Before the invention of more expedient modes of conveyancing, feoffment with livery of seisin was the common method of transferring possession and title from one subject to another. The Crown, however, could neither give nor take land by livery, as this would have been inconvenient and beneath the royal dignity.[67] The rule that corporeal hereditaments lie not in grant but in livery, which applied to subjects until abolished by statute in 1845,[68] was therefore inapplicable to the Crown. In fact, the rule was turned on its head:

> ... Livery of Seizin is Matter of Fact, which the King cannot do, for his Acts ought to pass by Matter of Record, which is suitable to His Majesty; and therefore the Land shall pass by the King's Letters-patent only by the Course of the common Law.... And also if a Man would give Land to the King, ... the King cannot take this by Livery, but it ought to pass to him by Deed enrolled or Matter of Record, *causâ qua supra*.[69]

Thus, at common law every conveyance of land to or from the Crown had to either be recorded as a memorial of a court of

[64] (1225) 9 Hen. III. Note that the words 'of his Freehold', which did not appear in the original Charter, were added in 1217: see McKechnie, op. cit. 375, 383. This provision is still in force, and binds the Crown today: 8 *Halsbury's Laws*[4], par. 908 n. 2. Its application, however, appears to be subject to statutes of limitation: see n. 62 above.

[65] See P. & M. I. 515–17.

[66] Note that a more general reason—that the king can do no wrong—is commonly given for the rule: see *HEL* III[5]. 465–6.

[67] *Case of Duchy of Lancaster* (1562) 1 Plow. 212, at 213. See also *Willion* v. *Berkley* (1561) 1 Plow. 223, at 233.

[68] *Real Property Act*, 8 & 9 Vict., c. 106, s. 2.

[69] *Case of Duchy of Lancaster* (1562) 1 Plow. 212, at 213. See also *Calvin's Case* (1608) 7 Co. R. 1[a], at 12[a]; Staunford, *Prerogative*, 56[a]; Callis, *Sewers*[4], 37.

record or Parliament,[70] or be by letters patent, which, being under the Great Seal, seem to be records in themselves.[71] Moreover, this requirement was not confined to conveyances, for (statutes of limitation aside) unless possession was cast upon it by law, as a general rule the Crown could not acquire possession, and therefore could not take an estate or interest in land, otherwise than by matter of record.[72] A means was therefore necessary to give the Crown its due in those situations where it had a right to land, but a record was lacking. The procedure devised for this purpose was the inquest of office.

(a) Inquests of Office

Blackstone defined inquest of office as

> ... an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.[73]

[70] See *Co. Litt.* 260[a]; *Jowitt's Dictionary*[2], 'Record'; *The Queen* v. *Hughes* (1866) LR 1 PC 81.

[71] *Wimbish* v. *Willoughby* (1552) 1 Plow. 73, at 76; *Willion* v. *Berkley* (1561) 1 Plow. 223, at 231–2; Chitty, *Prerogatives*, 192. However, since letters patent are invariably enrolled, in *The Queen* v. *Hughes* (1866) LR 1 PC 81, at 87, it was said to be unnecessary to consider whether they would be records by the mere act of sealing.

[72] See *St German's Doctor and Student*, 91 SS, 65; *Viner's Abr.*, 'Prerogative', Z. c–B. d; *Comyns' Dig.*, 'Praerogative', D. 66. There were exceptions, however: the Crown could seize the lands of the king's widow if she remarried without licence, and the lands of alien priors *ratione guerre*, 'for in bothe these cases the kinges title is notorious enoughe althoughe it appere not of recorde. But yet in those cases his highnes must seise eare he can have anye interest in the lands because they bee penal toward the partie' (Staunford, *Prerogative*, 55). Respecting the second exception see also YB 21 Hen. VII, 7, pl. 6; Coke, *2nd Institutes*, 584; Chitty, *Prerogatives*, 249–50. Seizures *ratione guerre*, it seems, were temporary, designed to prevent aliens in England from aiding the enemy: see Farrer, 'Forfeiture of Enemy Property', 37 *LQR* 218, at 231. Also, apparently no record was necessary before the Crown could seize the temporalities of a bishop for contempt: YB 21 Hen. VII, 7, pl. 6; *Reynel's Case* (1612) 9 Co. R. 95[a], at 95[b]; *Viner's Abr.*, 'Office or Inquisition', D. 16; cf. Staunford, op. cit. 55[a].

[73] Blackstone, *Commentaries*, III. 258. This definition was adopted by Chitty, *Prerogatives*, 246. Due to statute, inquests of office are now largely obsolete: see *Jowitt's Dictionary*[2], 'Inquests of Office'; 11 *Halsbury's Laws*[4], par. 1579.

The inquiry took place before a jury, whose duty it was to determine whether there were facts to support a claim by the Crown to the property in question. The office, upon its return to the court from which it had issued, became the record of the Crown's title if the finding of the jury was in favour of the Crown's claim. Offices were of two kinds: entitling and instruction, issued out of Chancery and Exchequer respectively. The first vested the estate and possession of the land in the Crown, where it had but a right before; the second created a record of the location and extent of land where the estate and possession were already lawfully in the Crown, so that the land could be put in charge in the Exchequer.[74]

An office of entitlement found rather than gave the Crown its title; it was designed 'to bring the king to land by solemn matter of record, suitable to his regality, and for the safety of the subject, that he should not enter or seise the lands of the subject upon surmises'.[75] In the absence of other record of the Crown's title, an office was therefore necessary to give the Crown possession whenever lands were in the possession of a subject when the Crown's title accrued: that is, as Staunford wrote, 'in all cases where a common person can not have a possession neither in dede nor in law without an entre'.[76] Examples are where lands were acquired by an alien, idiot, or lunatic, or a villein of the Crown, or were alienated in mortmain or without licence by the Crown's tenant.[77] In each of these cases the Crown did not have possession, and could not seize the lands into its own hands, until the facts upon which its title depended were made a matter of record by office. Where, however, the lands were vacant when the Crown's title accrued, the law cast the possession on the Crown, for otherwise the freehold would have been in abeyance.[78] Thus, if the Crown's tenant in fee simple died seised without heirs, or was attainted of felony and died before being deprived of his lands

[74] *Page's Case* (1587) 3 Co: R. 52[a], at 52.

[75] *Sheffeild* v. *Ratcliffe* (1615) Hob. 334[a], at 347[a]. See also Blackstone, *Commentaries*, III. 259; *Bacon's Abr.*, 'Prerogative', E. 7; Chitty, *Prerogatives*, 247.

[76] Staunford, *Prerogative*, 55[a].

[77] Ibid.; *Comyns' Dig.*, 'Praerogative', D. 67; Chitty, *Prerogatives*, 249–50. In case of forfeiture for high treason, however, the Crown had the lands without office by 33 Hen. VIII, c. 20.

[78] See *Comyns' Dig.*, art. cit., D. 70; Chitty, op. cit. 249.

by office, then by law the Crown was in immediate actual possession without office found.[79] In these cases, however, an office of instruction would have been appropriate if the description of the lands so acquired was not a matter of record.[80]

Where an office was necessary, in some instances it gave the Crown possession only if the person through whom the Crown claimed possessed the lands at the time the Crown's title accrued.[81] Thus, at common law, if the Crown's title resulted from attainder for treason of a disseisee and the office found the disseisin as well as the prior seisin of the disseisee, the Crown would not have been in possession without a *scire facias* or actual seizure.[82] In such cases the general rule was that the Crown could not seize without a *scire facias* where a subject could not enter or seize without an action.[83]

Inquests of office were therefore the common law means by which the Crown either acquired or established its right to possession. With rare exceptions[84] they were necessary where

[79] Though Staunford thought the Crown acquired mere possession in law (*Prerogative*, 53[b]), it was resolved in *Sadlers' Case* (1588) 4 Co. R. 54[b], at 58[a], that the Crown would be in actual possession without office or seizure, unless a disseisor was in possession at the time the Crown's title accrued, in which case it would not be in possession until its title had been found by office and the possession of the disseisor removed. See also *Willion* v. *Berkley* (1561) 1 Plow. 223, at 229–30; *Dowtie's Case* (1584) 3 Co. R. 9[b], at 10[b]; *Reynel's Case* (1612) 9 Co. R. 95[a], at 96[a].

[80] See *Page's Case* (1587) 3 Co. R. 52[a], at 52[b].

[81] See Staunford, *Prerogative*, 54[a]; *Sadlers' Case* (1588) 4 Co. R. 54[b], at 58[a].

[82] *Dowtie's Case* (1584) 3 Co. R. 9[b], at 11[a]. The main issue was whether 33 Hen. VIII, c. 20, which gave the Crown actual possession of an attainted traitor's lands without office, had that effect where a disseisor was in possession at the time of attainder; it was resolved that it did not.

[83] See Staunford, *Prerogative*, 54[b]–55[a]; *Reynel's Case* (1612) 9 Co. R. 95[a], at 96[b].

[84] In addition to the instances where no record was necessary referred to in n. 72 above, mention should be made of the *Earl of Derby's Case* (1598) 2 And. 115, where, according to Coke (*4th Institutes*, 284), it was resolved 'seeing no office could be found to entitle the king to the forfeiture [of the Isle of Man] of treason, that the king might grant by a commission under the great seal to seise the same into the kings hands, &c. which being done and returned of record is sufficient to bring it into the kings seisin and possession, and into charge, &c.' The reason why the Crown resorted to this remarkable procedure appears to be that an office issued out of Chancery respecting Man had been held to be void, as the Isle was not part of the realm: see *Anon.* (1519) Keil. 202[a]; *Calvin's Case* (1608) 7 Co. R. 1[a], at 21[b]. See also text acc. nn. 122–3 below.

the freehold was not cast upon the Crown by law and the Crown's title was not already a matter of record. But where the Crown claimed to be in possession, whether by record or otherwise, there was no need of an office for the Crown to recover the land from an intruder. In that situation a prerogative remedy—the information of intrusion—was available.[85]

(b) Informations of Intrusion

An information of intrusion was a proceeding commenced by the Attorney-General in the Court of Exchequer respecting a wrong, such as entry without title, holding over after the expiry of a Crown lease, taking profits, cutting timber, and the like, committed against lands of the Crown.[86] Though in the nature of an action in trespass *quare clausum fregit*, this proceeding also served to recover Crown lands from a subject who was wrongfully occupying them because, as we have seen, in the eyes of the law the Crown could not be dispossessed.[87] Statutes of limitation aside, an intruder on Crown land would always be a trespasser: he could never acquire a tortious estate.[88] This may explain why at common law a defendant on an information of intrusion, unlike a defendant in ejectment, could not

[85] *A.-G.* v. *Parsons* (1836) 2 M. & W. 23. See also *Burgess* v. *Wheate* (1759) 1 Eden 177, at 187–8.

[86] Blackstone, *Commentaries*, III. 261; Chitty, *Prerogatives*, 332; Manning, *Exchequer Practice*[2], 196. Note that the *Crown Proceedings Act*, 1947, 10 & 11 Geo. VI, c. 44 replaced informations of intrusion with other proceedings: see 11 *Halsbury's Laws*[4], par. 1407.

[87] *Hatfield* v. *Alford* (1846) 1 Legge 330, at 345. One may wonder why an information lay against an overholding tenant of the Crown, for an action of trespass was not available to other landlords in this situation without an entry: *Trevillian* v. *Andrew* (1698) 5 Mod. 384. The explanation seems to be that because laches could not be imputed to it for not entering, the Crown would be in possession the moment the tenancy expired: see *Finch's Case* (1591) 2 Leon. 134, at 143–4; *Co. Litt.* 57[b]; Blackstone, op. cit. II. 150. Since the lease would be a matter of record, the title of the Crown as against the lessee would be too, and where the Crown is entitled by matter of record it is generally in possession regardless of the occupation of another (see, however, n. 81 and text above).

[88] *Comyns' Dig.*, 'Praerogative', D. 71.

rely on his occupation.[89] He could, however, raise the issue of title by pleading specially. But if he entered a general plea of not guilty or *non intrusit*, the sole issue would be whether he had actually intruded (i.e. entered) on the land, with the result that if in occupation, he would be immediately evicted.[90] The reason why the Crown was not put to proof of its own title, before the defendant was required to answer, was that its title regularly appeared of record; if it did not, then the information itself revealed the Crown's title to the defendant and was a sufficient record for the purpose of the proceeding.[91]

This advantage accorded to the Crown at common law on an information of intrusion was taken away by statute in 1623 where the Crown or its predecessor had been out of 'possession' (that is, in the Crown's case, had not been in occupation) or had not taken profits for twenty years before the information was laid; in that situation, the defendant could plead the general issue and 'retain the possession ... until the title be tried, found, or adjudged for the King.'[92] This provision reversed the burden of proof, and obliged the Crown to prove its own title just like a plaintiff who claims land which is in another's possession.[93]

Apart from the statute, however, the defendant had to plead specially and, it has been said, show title in himself.[94] For this purpose it was generally sufficient for him to show 'a mere legal title to possession only'.[95] But it is doubtful whether this meant

[89] *Leigh* v. *Hudson* (1565) 2 Dyer 238[b]; *The King* v. *Steel* (1834) 1 Legge 65, at 66. In ejectment the defendant's occupation was presumed to be possession, but on an information of intrusion it was not: see ch. 2 n. 2 and text above.

[90] Coke, *4th Institutes*, 116; Chitty, *Prerogatives*, 333; Manning, *Exchequer Practice*[2], 198; Robertson, *Civil Proceedings*, 180–1.

[91] Coke, loc. cit.; *The King* v. *Steel* (1834) 1 Legge 65, at 67; *Mudgway* v. *Davy* (1886) 4 NZLR (CA) 192, at 206. See also *Comyns' Dig.*, 'Praerogative', D. 74; *A.-G.* v. *Hallett* (1847) 1 Ex. 211, at 218–19 (arg. of A.-G.).

[92] 21 Jac. I, c. 14, s. 1 (note that s. 2 prevented the Crown from avoiding the effect of the statute by proceeding by way of *scire facias*).

[93] *A.-G.* v. *Parsons* (1836) 2 M. & W. 23, at 25–6; *A.-G.* v. *Corp. of London* (1850) 2 Mac. & G. 247, at 258–9; *Mudgway* v. *Davy* (1886) 4 NZLR (CA) 192, at 206; *Emmerson* v. *Maddison* [1906] AC 569, at 576–7, 579–80 (see n. 102 below); *Hamilton* v. *The King* (1917) 54 SCR 331, esp. 374–5.

[94] *A.-G.* v. *Hallett* (1847) 1 Ex. 211, at 219.

[95] Chitty, *Prerogatives*, 334; Manning, *Exchequer Practice*[2], 199.

that he had to prove a right to possession good against all the world. More likely, he could have discharged the burden by proving a right which was better than that alleged by the Crown. In *Leigh* v. *Hudson*,[96] commonly cited as authority for the rule that the defendant had to show a title, it was pleaded that long before the Queen had any right to the land, an abbot, while seised in fee, had leased it for a term of years to a third party, *que estate* the defendant had. The Attorney-General attempted to traverse the lease, and failed, whereupon he challenged the sufficiency of the defendant's title on the ground that 'a *que estate* of a term, which may well be granted out of the land, differs from a *que estate* of a freehold.'[97] The court accepted that argument, but held that it came too late, as the Attorney-General had chosen to traverse the lease rather than demur and rely on the lack of an allegation that the termor had granted it to the defendant. The defendant's plea was therefore bad because the leasehold estate could have been acquired by him only by lawful means, such as a grant, which he failed to allege; but apparently it would have been otherwise if he had claimed a *que estate* of freehold, for a freehold could be acquired by unlawful means, such as disseisin.[98] It seems, then, that it would have been sufficient for the defendant to prove that a third party had been seised for a freehold estate, which estate the defendant, rightly or wrongly, had, for that would have disproved the seisin of the Crown alleged in the information, without which the defendant would not have been an intruder.[99] This had to be so, for otherwise the Crown could

[96] (1565) 2 Dyer 238[b].

[97] Ibid.

[98] See *Thurston's Case* (1594) Owen 16, as quoted in notes to 2 Dyer 172[a], 238[b]; *Helyar's Case* (1599) 6 Co. R. 24[b]; *Co. Litt.* 121. Quaere whether it later became possible to acquire a leasehold estate by wrong: see *Co. Litt.* 271[a], Butler's n. 1; Preston, *Conveyancing*, II. 214–23.

[99] An information of intrusion 'supposeth that the party intruded upon the King's possession' (*Friend* v. *Duke of Richmond* (1667) Hard. 460, at 462); see also *Doe d. Watt* v. *Morris* (1835) 2 Bing. (NC) 189, at 197; *John* v. *Rivers* (1873) 2 NZCA 344, at 358. So if the Crown did not have possession, there could be no intrusion: see Staunford, *Prerogative*, 55[b]. Accordingly, if it appeared that the Crown had granted the lands to another, the defendant would not have to prove a title in himself: see *The King* v. *Watson* (1828) 1 NBR 188; *R.* v. *Cooper* (1886) 7 NSWLR 15; *A.-G.* v. *Boyle* (1893) 14 NSWLR

have used this proceeding indiscriminately to acquire the lands of disseisors without establishing even a shadow of right in itself. The result would have been widespread injustice, not only to disseisors,[100] but to disseisees as well because their rights of entry would have been cut off by the judgment in favour of the Crown.[101]

The advantage the Crown had on an information of intrusion was thus not as great as might appear at first glance. More importantly, the advantage was procedural rather than substantive: it merely cast the initial burden of proof on to the defendant.[102] He could not rely on his occupation and the presumption of possession, and hence of title, usually arising therefrom, for the information alleged the possession to be in the Crown. He could, however, rebut that allegation by showing that he had either leasehold possession or seisin. To show the former it seems he would have had to prove the conveyance of a valid lease to himself.[103] The latter, however,

424. (Note that there is a suggestion in *A.-G.* v. *Meller* (1667) Hard. 451, per Hale CB at 452, citing *Leigh* v. *Hudson*, that a defendant on an information of intrusion could not plead a *que estate*, but at 453 the Chief Baron distinguished that case because it involved a lease for years.) See also *A.-G.* v. *Stonehouse* (1662) Hard. 229; *The King* v. *Bishop of Worcester* (1669) Vaug. 53, at 64.

[100] A disseisor has an estate, and is entitled to compensation if the lands are expropriated by the Crown: *Perry* v. *Clissold* [1907] AC 73.

[101] Once the Crown is seised by matter of record, possession generally cannot be taken from it by entry: see n. 110 below. See also *Friend* v. *Duke of Richmond* (1667) Hard. 460.

[102] Since 21 Jac. I, c. 14 was 'an Act regulating procedure merely', its effect being 'to put a person against whom the Sovereign may file an information of intrusion on the same footing as a defendant in an ordinary action of ejectment' (*Emmerson* v. *Maddison* [1906] AC 569, at 576), the Crown at common law cannot have had a substantive advantage.

[103] See, however, *Payne's Case* (1587) 2 Leon. 205, where the defendant argued that although a lease had been assigned to the Queen before he entered, it had not been enrolled until after; and therefore he could not be an intruder, for the Queen could have no interest before her title was made a matter of record by enrolment. His appeal was dismissed, but apparently on the ground that the intrusion, having been found by the jury, could not be questioned on a writ of error. Also, quaere whether a defendant could have claimed leasehold possession as dispossessor of a termor of the Crown, for there is authority that such a leasehold could be acquired by wrong: see *Anon.* (1582) 3 Leon. 206; *Lee* v. *Norris* (1594) Cro. Eliz. 331; *Thurston's Case* (1594) Owen 16; cf. *Wyngate* v. *Marke* (1592) Cro. Eliz. 275.

could be shown simply by proving that a third party had been seised for a freehold estate which the defendant now claimed as possessor. That claim would, of course, have been rebuttable by the Crown,[104] either by proving its own seisin or disproving that of the third party; but failing that, the defendant could not have been judged an intruder. Thus, although it has been held that the title of the Crown could be tried on an information of intrusion without the necessity of first establishing the title by office,[105] the information would have been dismissed if the defendant succeeded in rebutting the allegation of Crown possession. This would have been true whether the Crown had title or not.[106] It is therefore not strictly correct to say that the information tried the title of the Crown; rather, the issue to be determined was whether the Crown was in possession at the time the information was laid.[107] Though the Crown often would have had possession if it had title, this would not be so before office where an office was necessary for the Crown to have possession.[108]

An example may help to clarify this. Say A, a tenant in fee simple of the Crown, died seised, intestate and without heirs, and then B entered. As the law by escheat would have cast the

[104] See *A.-G.* v. *Meller* (1667) Hard. 451, at 460.

[105] *A.-G.* v. *Parsons* (1836) 2 M. & W. 23, where it was decided that this is so even where the defendant had been in possession for 20 years. See also *The King* v. *Steel* (1834) 1 Legge 65, at 68.

[106] In *Payne's Case* (1587) 2 Leon. 205 (see n. 103 above) apparently this was generally conceded, the issues being whether enrolment of the assignment had relation back to the time it was delivered, and whether there could be a continuance of intrusion. See also *Finch's Case* (1591) 2 Leon. 134, at 144–6, from which it appears that where the Crown had title and another was in possession, an information of intrusion would not lie until possession had been vested in the Crown by office.

[107] This is necessarily so because the proceeding was in the nature of an action in trespass: see *Case of Mines* (1568) 1 Plow. 310, at 337. Note, however, that although it probably would have been no defence at law for a defendant to say that he came in under a Crown grant which was in fact void (*The Queen* v. *Hughes* (1866) LR 1 PC 81, at 92; cf. *Harper* v. *Charlesworth* (1825) 4 B. & C. 574, at 590), he could have set up an equitable title against the Crown: *A.-G. for Trinidad and Tobago* v. *Bourne* [1895] AC 83.

[108] See Staunford, *Prerogative*, 55[a], 56[b]. In *A.-G.* v. *Parsons* (1836) 2 M. & W. 23 (see n. 105 above) the Crown had a title by descent, and was clearly in possession when the defendant entered: see *Doe d. Watt* v. *Morris* (1835) 2 Bing. (NC) 189, at 190, on the same lands.

possession on the Crown without office when A died,[109] an information of intrusion would have lain against B. Apparently, it would not have mattered if B had a better right than A and could have entered upon him, since B would have been an intruder on the Crown's possession none the less.[110] (However, B could subsequently have recovered the land by petition of right.)[111] If, on the other hand, B had no right and disseised A, who then died so that escheat occurred, the possession would not have been cast on the Crown because the freehold would not have been vacant.[112] Since an office, followed in appropriate circumstances by *scire facias* or actual seizure, would have been necessary for the Crown to be in possession, an information of intrusion brought against B prior to that could have been met by proof of A's seisin for an estate in fee simple, *que estate* B had.

3. Exceptional Lands: The Foreshore and Territorial Sea-bed

Unlike other lands in the realm, the foreshore and the beds of tidal rivers and coastal waters are presumed to be owned by the

[109] *Sadlers' Case* (1588) 4 Co. R. 54[b], at 58[a].

[110] See Staunford, *Prerogative*, 56[a]–57[a], from which it appears that the Crown's possession, once acquired (Staunford added 'by matter of record', but the same would be true where possession was cast upon the Crown; for, contrary to Staunford's view, such possession was not just in law, but in deed: see n. 79 above), could be taken away by entry only in the exceptional case where the Crown actually seized land by colour of a record which did not show a title for the Crown, as where it was found by office that 'the kynges tenaunte dyed seysed but of an estate for terme of lyfe the reversion to an other', and the Crown seized none the less.

[111] Blackstone, *Commentaries*, III. 256. See also Staunford, op. cit. 74[a], where it is written that a Crown tenant who was disseised, and suffered the disseisor to die in possession, was driven to his petition where it was found by office that the Crown's tenant (i.e. the disseisor) died seised, his heir within age. The other remedies available to the subject against the Crown, *monstrans de droit* and traverse of office, were available only where there was a record which, in the former case, revealed the subject's title as well as the Crown's, or, in the latter, found a title for the Crown upon facts which the subject who had a better title could disprove: see gen. Chitty, *Prerogatives*, 340–57.

[112] *Sadlers' Case* (1588) 4 Co. R. 54[b], at 58[a].

Crown by prerogative right.[113] Statutes of limitation apart, a subject who lays claim to them must allege a Crown grant.[114] Though in practice the strictness of this rule has been tempered by the willingness of courts to presume a grant in appropriate circumstances,[115] the burden on the subject is none the less considerable. As for the reason for the rule, it has been suggested that, unlike other lands, the foreshore and sea-bed were not generally granted out by the Crown, and consequently its original title has usually been retained.[116] But we have seen that Crown grants of other lands are in most cases fictitious. Why not apply the same fiction here? A possible explanation lies in the fact that the fiction of grants was invented along with the fiction of original Crown occupation and ownership to explain the Crown's paramount lordship over lands that were originally occupied by others. But the foreshore and sea-bed are different because, except where a pier, retaining wall, or the like is built, they cannot be occupied in the same way as other lands. More commonly they are unoccupied, and probably always have been, and are therefore presumed to have remained in the original occupation of the Crown, which extends to all waste lands that have never been held by subjects.[117] Furthermore, there are important public rights of navigation and fishing over tidal and coastal waters that need to be protected.[118] Consequently, the 'ownership of

[113] See Hale, *De Jure Maris*, c. iv, in Moore, *Foreshore*, 376–83; *Bacon's Abr.*, 'Prerogative', B. 3; Chitty, *Prerogatives*, 206–8; *Coulson and Forbes on Waters*[6], 25–6. For a critique see Moore, op. cit., esp. pp. xxvii–liv; cf. Lemmon, *Public Rights*, 49–53. Note that in Scotland, though this rule generally applies, the Orkneys and Shetlands are exceptional: see *Smith* v. *Lerwick Harbour Trustees* (1903) 5 SC (5th) 680; Drever, 'Udal Law', 16 *Jur. R.* 189.

[114] Hall, *Sea-Shores*[2], 3, Loveland's n. (*f*), 6; 8 *Halsbury's Laws*[4], par. 1418, esp. n. 2.

[115] See Robertson, *Civil Proceedings*, 573–4; *Coulson and Forbes on Waters*[6], 29–38.

[116] See *Bacon's Abr.*, 'Prerogative', B. 1; Chitty, op. cit. 207; Hall, *Sea-Shores*[3], 6, in Moore, *Foreshore*, 672 (Moore disputed this: see esp. 24).

[117] See *Bacon's Abr.*, art. cit. B. 1, 3; Hall, op. cit. 4–6, in Moore, op. cit. 670–1. Blackburn J., in *Ipswich Dock Commissioners* v. *Overseers of St Peters* (1866) 7 B. & S. 310, at 344, described the sea and its estuaries as 'part of the waste and demesnes and dominions of the Crown, . . . of the great waste, both land and water, of which the king is lord.'

[118] See 8 *Halsbury's Laws*[4], par. 1419.

the Crown is for the benefit of the subject'.[119] The existence of these rights also excludes to a large extent the possibility of exclusive occupation of the underlying lands.[120] For these reasons, the foreshore and sea-bed are unique, and so special rules respecting them have been developed that do not apply to other lands.[121]

We have seen that, as a general rule, the Crown's title must be a matter of record before the Crown can be in possession of lands. The most notable exception is where possession is cast upon the Crown by law. But in the case of the foreshore and sea-bed the Crown is presumed to have been in possession all along. Accordingly, no record of the Crown's title is necessary. Subjects who occupy these lands are therefore prima-facie intruders. Furthermore, in the absence of a Crown grant, any predecessors through whom they claim would have been intruders as well, without an estate or interest that could be passed on.[122] It has therefore never been necessary for the Crown to initiate an inquest of office to establish its original title to the foreshore or sea-bed. It could simply lay an information of intrusion, thereby casting the burden on the defendant to prove either a Crown grant, or continuous occupation of sufficient duration for a grant to be presumed or a title by limitation acquired.[123]

[119] *Gann* v. *Free Fishers of Whitstable* (1865) 11 HLC 192, per Lord Westbury at 207. See also *Dickens* v. *Shaw* (1823) 1 LJKB 122, at 124. Although the right of navigation cannot be derogated from by grant, the Crown could destroy the public right of fishing in this way until prohibited from doing so by *Magna Carta*: see the *Gann* decision, 207–9; 8 *Halsbury's Laws*[4], par. 1419 n. 5.

[120] *Lord Advocate* v. *Young* (1887) 12 App. Cas. 544, at 553; *Tweedie* v. *The King* (1915) 52 SCR 197, at 214; *Fowley Marine* v. *Gafford* [1968] 2 WLR 842, at 856.

[121] See *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, at 665–7; Lemmon, *Public Rights*, 53–71; cf. *Smith* v. *Lerwick Harbour Trustees* (1903) 5 SC (5th) 680.

[122] See *Lord Advocate* v. *Young* (1887) 12 App. Cas. 544, at 552, 555. Though that decision related to Scotland, the law in England on this point is the same, as the cases cited in the following note attest.

[123] *A.-G.* v. *Portsmouth* (1877) 25 WR 559, CA judgment (1878, unreported), as cited in Moore, *Foreshore*, 557; *A.-G.* v. *Emerson* [1891] AC 649, at 653. For the form of an information claiming the foreshore and sea-bed by original right see Moore, op. cit. 510, quoting the information laid in *A.-G.* v. *Phillips* in 1857, but withdrawn before trial.

4. Conclusions

It is mostly a fiction of law that the Crown originally possessed, and therefore owned, all the lands in England. Put another way, the law supposes that all lands were at one time vacant, and that the Crown took them as occupant. In the case of the foreshore and territorial sea-bed, this supposed taking probably had a factual basis of sorts. Because these exceptional lands were largely unoccupied by subjects, the Crown's occupation of the realm as a whole would have extended to them.[124] Accordingly, the Crown has a prima-facie title. A subject who lays claim to these lands must, therefore, present evidence from which a Crown grant or a title by limitation can be found. Regarding other lands, however, the law generally deems Crown grants to have been made. Where a subject is in possession, the burden is thus on the Crown to show its own title.

Unlike a subject, however, the Crown usually cannot establish a prima-facie title by proving prior possession in itself. This is because it generally must have a specific title—in most cases a recorded title—in order to be in possession in the first place. In other words, unless the Crown's possession and title are original (as in the case of the foreshore and sea-bed), the Crown has possession because it has title, not vice versa.

If, however, the Crown claimed land by laying an information of intrusion, its title and possession were presumed (provided, after enactment of 21 Jac. I, c. 14, it had not been out of 'possession' for twenty years). Although this presumption gave the Crown a procedural advantage, it did not affect the substantive rights of the parties: it merely cast the burden on a defendant who was not within the statute of proving that he was in possession, rightly or wrongly, for a freehold or leasehold estate, thereby rebutting the presumption of Crown possession upon which the proceeding depended. The availability of this prerogative action did not, therefore, detract from the general rule that the Crown must have a title before it can

[124] This ubiquity of the Crown with respect to vacant lands may be seen as well in colonies acquired by settlement: see below, ch. 5 nn. 3–4 and text, ch. 7 text acc. nn. 81–3.

succeed in a claim to land brought against a subject who is in possession.

As for the doctrine of tenures, its effect in this context is to give the Crown a paramount lordship over lands held by subjects. The fiction of original Crown ownership and grants was invented to explain how this feudal relationship arose. That is the fiction's purpose, and that is the extent of its application. The doctrine of tenures, though capable at common law of giving the Crown a title to land in the event an estate held of it expired, cannot be used otherwise to claim lands which subjects possess.

This completes our examination of English land law. We now shift our attention to the Crown's overseas dominions to see how this law applies there, particularly where lands occupied by indigenous people are concerned. This will involve some discussion of colonial constitutional law, including an examination of the methods by which the Crown acquired new territories, for the classification of a colony can be of vital importance to indigenous land claims.